No. 44389-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ADRIAN JUAN TOMAS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 12-1-00317-3

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statutes

Rules

A. APPELLANT'S ASSIGNMENTS OF ERROR

1) The trial court erred in not taking count III, kidnapping in the first degree, from the jury for lack of sufficiency of the evidence of restraint.

2) The trial court erred in not taking count III, kidnapping in the first degree, from the jury for lack of sufficiency of the evidence where the restraint, if any, was incidental to the offense of assault in the first degree

3) The trial court erred in sentencing Tomas to consecutive sentences for his two serious violent offenses where the offenses encompassed the same criminal conduct for sentencing purposes.

4) The trial court erred in imposing a community custody condition requiring Tomas to have a chemical dependency evaluation.

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence in this case was sufficient to convict Tomas of both kidnapping in the first degree and assault in the first degree because each crime required proof of an element that was not required for conviction of the other crime, neither crime required proof of the other crime, and there was substantial evidence to prove all elements of both crimes.

2. The trial court did not err when it sentenced Tomas to consecutive sentences for his convictions of both kidnapping in the first degree and assault in the first degree. The crimes occurred against the same victim, but the crimes occurred

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

at different times and places. Therefore the crimes were not the "same criminal conduct" for sentencing purposes. Additionally, Tomas's objective criminal intent was different between the two the crimes.

3. Because the court did not make a finding that Tomas suffers form a chemical dependency and that it contributed to his offense, the court erred when it ordered as a condition of community custody that Tomas obtain a chemical dependency evaluation and follow up treatment. But, there is evidence in the record to support a finding that alcohol contributed to the offense; therefore, the case should be returned to the trial court for the trial court to correct the community custody condition to specify that Tomas should complete alcohol treatment rather than chemical dependency treatment.

C. FACTS AND STATEMENT OF THE CASE

The State accepts Tomas's statement of facts, but the State supplements with additional facts, below, and where needed to develop the State's arguments. RAP 10.3(b).

The trial testimony of the victim shows that on the day that Tomas committed the offenses in the instant case, Tomas had agreed to let the victim, Michael Lowe, stay at Tomas's house for the evening. RP 54. Prior to Tomas and Lowe going to Tomas's house for the evening, they first went to several bars in downtown Shelton. RP 55. After leaving the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

last bar at closing time, Lowe went alone to Tomas's truck, and finding it locked, climbed into the back of the truck and went to sleep. RP 56-57.

While Lowe was asleep in the back of the truck, Tomas returned to the truck, where he saw Lowe asleep in the back of the truck, and while Lowe was asleep, Tomas drove him to a clear-cut in a remote, wooded area. RP 58-64, 81-86, 92-93. The next thing Lowe was aware of was that he awoke to Tomas yelling and screaming and telling him to wake up. RP 57. Lowe was still in the bed of the truck, and Tomas was hitting him in the stomach to get his attention. RP 57. Tomas then pulled Lowe from the bed of the truck and beat him with a metal pipe. RP 57-64.

Lowe testified that he did not willingly go with Tomas to the clear-cut and that he would not have gone there had he not been asleep. RP 67. Lowe testified that his understanding of where they were supposed to be going when he got into the back of the truck was that they were going to be going back to Tomas's house for the night. RP 67.

Tomas's version of what happened, which he told a detective, was that he was driving in downtown Shelton when he noticed that Lowe was in the bed of his truck, so he pulled over, and Lowe then jumped from the bed of the truck and punched him. RP 153. Tomas later changed the story and admitted that he hit Lowe, and he said he did so because Lowe had

committed a burglary and stole several things from him. RP 154. He said that he was upset about that and that, when they left the bar and drove out into the woods, he and Lowe became involved in physical fight. RP 154-55.

Detective Rhodes of the Mason County Sheriff's Office obtained a security video from near the bar where Lowe was drinking, and it showed Lowe leave the bar and go to the pickup truck, try the cab without entry, and then climb into the bed of the truck. RP 163. The detective saw video of Tomas walking down the street in front of the bar, where Tomas then approached the truck, paused a minute, and then entered the cab and drove away with Lowe still in the bed of the truck. RP 164-65.

D. ARGUMENT

1. The evidence in this case was sufficient to convict Tomas of both kidnapping in the first degree and assault in the first degree because each crime required proof of an element that was not required for conviction of the other crime, neither crime required proof of the other crime, and there was substantial evidence to prove all elements of both crimes.

After receiving the evidence in this case, the jury convicted Tomas of kidnapping in the first degree and assault in the first degree. CP 35, 37

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Tomas contends that there was insufficient evidence to sustain his conviction for kidnapping as a separate crime from the assault because the kidnapping was done in order to accomplish the assault. Brief of Appellant at 4-7.

RCW 9A.36.011 defines the crime of assault in the first degree as follows:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> (c) Assaults another and inflicts great bodily harm.

In Count II of the first amended information that was tried to the jury, the State alleged that Tomas:

> with intent to inflict great bodily harm, did assault another person, to wit: Michael Lowe, with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death and/or did inflict great bodily harm; contrary to RCW 9A.36.011(1)(a)....

CP 86-88. The jury was instructed that to convict Tomas of assault in the first degree, it must find beyond a reasonable doubt:

> (1) That on or about August 5th, 2012, the defendant assaulted

Michael Lowe;
(2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
(3) That the defendant acted with intent to inflict great bodily harm; and
(4) That this act occurred in the State of Washington.

CP 60 (Jury Instruction No. 18).

In regard to the charge of kidnapping in the first degree, the offense is defined by statute as follows:

> (1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:
> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
> (b) To facilitate commission of any felony or flight thereafter; or
> (c) To inflict bodily injury on him or her; or
> (d) To inflict extreme mental distress on him, her, or a third person; or
> (e) To interfere with the performance of any governmental function.

RCW 9A.40.020(1).

In Count III of the first amended information that was tried to the jury, the State alleged that Tomas:

> did intentionally abduct another person, to-wit: Michael Lowe, with intent to facilitate the commission of any felony or flight thereafter and/or to inflict bodily injury on him or her; and/or to inflict extreme mental distress on him or her or a third person; contrary to RCW 9A.40.020(1)(b)(c) and/or (d)....

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

CP 86-88. The jury was instructed that to convict Tomas of kidnapping in the first degree, it must find beyond a reasonable doubt:

> (1) That on or about August 5th, 2012, the defendant intentionally abducted Michael Lowe;
> (2) That the defendant abducted that person with intent to inflict bodily injury on the person; and
> (3) That any of these acts occurred in the State of Washington.

CP 63 (Jury Instruction No. 21).

Consideration of the elements of the crimes of assault in the first degree and kidnapping in the first degree shows that each offense requires proof an element not required by the other offense, and neither offense is premised upon proof of commission of the other offense. If both offenses contain an element not contained in the other, and if each requires proof of a fact not required by the other, the two offenses are presumed not to be the same for double jeopardy purposes. *In re Borrero*, 161 Wn.2d 532, 536-37, 167 P.3d 1106 (2007).

First, to prove the crime of assault in the first degree the State was required to prove that Tomas assaulted Lowe. CP 60 (Jury Instruction No. 18). But no crime of assault was required in order to prove the crime of kidnapping in the first degree; instead, to prove the crime of kidnapping the State was required to prove that Tomas abducted Lowe with the *intent* to inflict bodily injury. CP 63 (Jury Instruction No. 21). Thus, only an

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

intent to assault is required as an element of kidnapping; to prove the assault crime, however, the State was required to prove an *actual*, completed assault. CP 60, 63. Because the crime of kidnapping was completed when Tomas abducted Lowe with the *intent to assault* him, but the crime of assault did not occur until Tomas *actually assaulted* Lowe, the two crimes do not merge. *State v. Vaughn*, 83 Wn. App. 669, 682, 924 P.2d 27 (1996), citing *Petition of Fletcher*, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989).

Still more, the crime of assault in the first degree requires proof that Tomas assaulted Lowe "with a deadly weapon or by a force or means likely to produce great bodily harm or death" and "[t]hat Tomas acted with intent to inflict great bodily harm." CP 60. These elements are absent from the required proof for the crime of kidnapping in the first degree. CP 63. But to prove the kidnapping offense, the State was required to prove that Tomas "intentionally abducted" Lowe, an element that is not required to prove the assault. CP 60, 63.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

inferences from the evidence must be drawn in favor of the State and interpreted strongly against the defendant. *Id.* at 201. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn" from it. *Id.* Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trier of fact is the sole and exclusive judge of the evidence. *State v. Bencivenga,* 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu,* 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

In the instant case, the evidence provided to the jury shows that when Tomas found Lowe asleep in the bed of the truck in downtown Shelton, he then without Lowe's permission drove Lowe to a secluded, rural, clear-cut area in the woods outside of town and that he did so with the *intent* to assault him. RP 58-64, 67, 153-55. Lowe did not go willingly. RP 67.

Tomas restrained Lowe against his will when he drove him to the clear-cut. RP 58-64, 67, 153-55. The restraint was not incidental to the assault; instead, the restraint was preliminary to the assault. *Id.* The kidnapping was not necessary or even in furtherance of the latter assault.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Id. Tomas could have assaulted Lowe in downtown Shelton, but instead, with the intent to latter assault him, Tomas kidnapped Lowe with the purpose of removing him to a new place of Tomas's choosing. *Id.* The kidnapping occurred before the assault, not during the assault or because of the assault; therefore, the kidnapping was not merely incidental to the assault. *Id.*

Once they arrived at the clear-cut, and after having had an opportunity to pause and reflect and to abandon his plan to assault Lowe, Tomas went forward with his intent and then committed an actual assault against Lowe, beating him with a metal pipe. RP 57-64.

Thus, the evidence in the instant case is sufficient to prove that Tomas first kidnapped Lowe (with the *intent* to latter assault him), and that after the elements of the crime of kidnapping had each manifested so that a completed crime had occurred, but before Tomas released Lowe, he then *actually* assaulted him and completed the crime of assault. On these facts, two distinct crimes were committed. *State v. Vaughn*, 83 Wn. App. 669, 682, 924 P.2d 27 (1996).

2. The trial court did not err when it sentenced Tomas to consecutive sentences for his convictions of both kidnapping

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

> in the first degree and assault in the first degree. The crimes occurred against the same victim, but the crimes occurred at different times and places. Therefore the crimes were not the "same criminal conduct" for sentencing purposes. Additionally, Tomas's objective criminal intent was different between the two the crimes.

A trial court's determination of whether two crimes constitute the same criminal conduct is reviewed on appeal for an abuse of discretion or misapplication of law. *State v. Freeman,* 118 Wn. App. 365, 377, 76 P.3d 732 (2003), *aff'd,* 153 Wn.2d 765, 108 P.3d 753 (2005). The term "same criminal conduct" is to be construed narrowly. *State v. Hernandez,* 95 Wn. App. 480, 485, 976 P.2d 165 (1999).

Two or more crimes may be considered the same criminal conduct if they (1) require the same criminal intent; (2) are committed at the same time and place; and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one of the prongs prevents a finding of "same criminal conduct." *State v. Price,* 103 Wn. App. 845, 855, 14 P.3d 841 (2000) (citing *State v. Vike,* 125 Wn.2d 407, 410, 885 P.2d 824 (1994)), *review denied,* 143 Wn.2d 1014 (2001).

In the instant case, Lowe was the victim of both crimes (kidnapping and the assault). RP 57-64, 81-86, 92-93. Arguably, if the facts were different, because Tomas kidnapped Lowe with the intent to

assault him, the two crimes were intimately related and Tomas's objective criminal intent remained the same throughout both crimes. *See, e.g., State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987) (kidnapping and robbery charges constituted same criminal conduct because objective criminal intent remained the same where defendant kidnapped victim with intent to rob him). But Tomas's two crimes did not occur at the same time and place. RP 57-64, 81-86, 92-93.

The crime of kidnapping began when Tomas, with the *intent* to assault Lowe, drove away from downtown Shelton (without Lowe's consent) while Lowe was in the bed of the pickup truck. RCW 9A.40.020(1). If Tomas would have released Lowe prior to committing the assault, the crime of kidnapping nevertheless would have been a completed crime. *Id.* One may argue that in some respects the kidnapping furthered, or facilitated, the commission of the assault, because Tomas's intent when he kidnapped Lowe was to take him to the clear-cut and assault him. Without the kidnapping, Tomas probably would not have been able to later complete the assault *at the clear-cut.*

But the kidnapping was not necessary to the assault, because Tomas could have assaulted Lowe without kidnapping him. Likewise, because the crime of kidnapping only requires that Tomas intended to

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

assault Lowe, rather than to require an actual assault, Tomas could have committed a kidnapping offense without committing an assault. 9A.40.020(1). And on the facts of this case, Tomas did exactly that -- he committed a kidnapping offense (with the present intent to later commit an assault). Then, after a completed, but ongoing, kidnapping offense had occurred, Tomas then committed an actual assault. RP 57-64, 81-86, 92-93.

Tomas could have assaulted Lowe in downtown Shelton. So, the kidnapping did not facilitate or further the crime of assault, instead the kidnapping only furthered or facilitated the place of the assault. And, likewise, the assault did not further the crime of kidnapping, because a completed crime of kidnapping had already occurred before the assault occurred. *See, e.g., State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992) (burglary and subsequent kidnapping did not involve the same time and place because the kidnapping was carried out over a longer period of time and involved several places, while the burglary occurred at one place and time); *State v. Larry*, 108 Wn. App. 894, 915-17, 34 P.3d 241 (2001) (although crimes of kidnapping and robbery involved same victim, the crimes were not same criminal conduct, because the kidnapping occurred

in several places over a larger period of time, while robbery occurred at a single time and place).

In the instant case, the kidnapping occurred in downtown Shelton and continued until Tomas arrived at the clear-cut. RCW 9A.40.020(1); RP 57-64, 81-86, 92-93. At the clear-cut, Tomas had an opportunity to pause and reflect and to abandon his plan to assault Lowe, but instead, Tomas then carried out the assault. *Id.* Because the kidnapping and the assault occurred at a different time, or at a different place, or at both a different time and place, the two crimes do not constitute same criminal conduct. *State v. Graciano*, 176 Wn. 2d 531, 540, 295 P.3d 219 (2013); *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Because these two crimes did not occur at the both the same time and the same place, this circumstance alone is reason to deny Tomas's appeal in this case. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). However, as an additional ground the State asserts that Tomas's crimes also do not constitute same criminal conduct because the two crimes do not require the same criminal intent.

To determine whether Tomas's two crimes, kidnapping and assault, constituted the same criminal conduct, the test is whether, when viewed objectively, Tomas's intent changed from one crime to the next

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

and whether one crime furthered the other. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003), *aff'd*, 153 Wn.2d 765, 108 P.3d 753 (2005). The defendant bears the burden of proving that the two offenses constituted the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). "If the defendant fails to prove any element under the statute, the crimes are not the 'same criminal conduct.'" *Id.* (quoting and citing *State v. Maxfield*, 125 Wn.2d 378, 383, 886 P.2d 123 (1994)). RCW 9.94A.589 is narrowly construed so as to disallow most claims of same criminal conduct. *Graciano* at 540.

"[I]f one crime furthered another, and if the time and place of the crimes remained the same,[1] then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992), citing *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

The standard is whether, when viewed objectively as opposed to subjectively, the criminal intent changed from one crime to the next. *State*

[1] As argued *supra*, the two crimes at issue in this case did not occur at the same time and place, which alone is grounds to deny Tomas's appeal of the issue of same criminal conduct. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) But for the sake of completeness, the State is also briefing the issue of intent, which can serve as an additional independent basis to deny Tomas's appeal of this issue.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

v. Vike, 125 Wn. 2d 407, 411, 885 P.2d 824 (1994) (citing *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987)).

"Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan." *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007), citing *State v. Lewis,* 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). However, if the criminal intent objectively changes between the two crimes, then the crimes are not the same criminal conduct. *Wilson* at 613. "[W]here the second crime is 'accompanied by a new objective "intent,"' one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct." *Wilson* at 613-614, quoting *State v. Grantham,* 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

When Tomas kidnapped Lowe, he did so because he intended to later assault him, but his objective criminal intent was to force his movement from downtown Shelton to a clear-cut in a rural area. Once at the clear-cut, Tomas then beat Lowe with a pipe, and when he did so, his objective criminal intent was to inflict great bodily harm. CP 60, 63; RP 56 -64, 81-86, 92-93.

"Two crimes manifest the 'same criminal conduct' only if they 'require the same criminal intent, are committed at the same time and place, and involve the same victim.'" *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013), quoting RCW 9.94A.589. As part of this analysis, courts also look to whether one crime furthered another. *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *see also, State v. Garza–Villarreal,* 123 Wn.2d 42, 46, 864 P.2d 1378 (1993).

"[A]bsent an abuse of discretion or misapplication of the law," the reviewing court "may not reverse a trial court's determination of what constitutes the same criminal conduct for offender score calculation purposes." *State v. Knight*, 2013 WL 5406441 (No. 42130-5-II , Sept. 24, 2013) (citing *State v. Till,* 139 Wn.2d 107, 122, 985 P.2d 365 (1999)). On the facts of the instant case, proof of assault and kidnapping did not require proof of the same criminal intent. Additionally, "[w]hen a defendant 'ha[s] the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,' the crimes are sequential and not the same criminal conduct." *State v. Mehrabian*, 175 Wn. App. 678, 308 P.3d 660 (2013) (quoting *State v. Grantham,* 84 Wn. App. 854, 859, 932 P.2d 657 (1997)).

3. Because the court did not make a finding that Tomas suffers form a chemical dependency and that it contributed to his offense, the court erred when it ordered as a condition of community custody that Tomas obtain a chemical dependency evaluation and follow up treatment. But, there is evidence in the record to support a finding that alcohol contributed to the offense; therefore, the case should be returned to the trial court for the trial court to correct the community custody condition to specify that Tomas should complete alcohol treatment rather than chemical dependency treatment.

On page 2 of the judgment and sentence, there is a boilerplate statement as follows: "The defendant has a chemical dependency that contributed to the offense(s). RCW 9.94A.607." CP 18. The box preceding the boilerplate statement is not checked. *Id.* No citation to the record was located where the trial court made a finding that Tomas suffers from a chemical dependency.

At the sentencing hearing, however, the trial court found as follows:

> Further, the Court will require that Mr. Juan Tomas, within the first thirty days of his release from confinement, have a substance abuse evaluation -- there was alcohol involved in this -- the evening leading up to these offenses -- and will follow all recommendations for treatment. The Court will require that he submit to drug testing and that he have -- complete a course of either the MRT or Getting it Right, whichever can be made available to him, to work on thinking errors.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

RP 295.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl,* 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones,* 118 Wn. App. 199, 204, 76 P .3d 258 (2003). A review of whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Unless explicitly permitted by statute, conditions that do not reasonably relate to the circumstances of the crime, the risk of re-offense, or public safety are unlawful. *See Jones,* 118 Wn. App. at 207–08.

A trial court may not impose a community custody condition unless it has statutory authority authorizing the condition. *State v. Warnock,* 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). The court has statutory authority to impose crime-related prohibitions and affirmative conditions. *Id.*; RCW 9.94A.505(8). Sentencing courts have specific statutory authority "to require an offender to '[p]articipate in crime-related treatment or counseling services' and in 'rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the

safety of the community.'" *Warnock* at 612, quoting RCW 9.94A.703(3)(c)-(d).

If the sentencing court finds that a convicted offender has a chemical dependency that has contributed to his or her offense, the court may order the offender to obtain a chemical dependency evaluation and to complete any recommended follow up treatment. RCW 9.94A.607(1); *Warnock* at 612. But "[i]f the court fails to make the required finding, it lacks statutory authority to impose the condition." *Warnock* at 612; see also, *State v. Jones,* 118 Wn. App. 199, 76 P.3d 258 (2003).

Tomas asserts that, because there was no finding that he suffered from a chemical dependency, the trial court erred when it ordered him to complete a chemical dependency evaluation and to complete any recommended treatment as a community custody condition. Brief of Appellant at 11. The facts and issue of law in the instant case are similar to the facts and issue of law in *State v. Warnock*, 174 Wn. App. 608, 299 P.3d 1173 (2013), where on review the Court of Appeals addressed the issue of:

> ...whether a sentencing court exceeds its statutory authority by ordering an offender to obtain chemical dependency evaluation and treatment as a community custody condition when no evidence and no finding exist that any substance except alcohol contributed to the sentenced offense.

Id. at 611.

The *Warnock* court held that the court's imposition of a community custody condition that required the defendant to complete a chemical dependency evaluation and follow up treatment was error because there was no evidence that the defendant suffered from a chemical dependency or that a chemical dependency contributed to the crime. *Id.* at 611-14. But the defendant in *Warnock* conceded that there was evidence of alcohol consumption in his case and that an alcohol evaluation and treatment was appropriate. *Id.* at 613. The *Warnock* court remanded the case to the trial court to correct the judgment and sentence so as to require only an alcohol evaluation and treatment and to remove the requirement for a drug evaluation and treatment. *Id.* at 614.

The same issue arose, but from the opposite perspective, in the case of *State v. Jones,* 118 Wn. App. 199, 76 P.3d 258 (2003), which held that the sentencing court erred by ordering alcohol treatment when the evidence showed only that drug use, and not alcohol use, contributed to the crime. *Id.* at 208.

RCW 9.94A.607 restricts the court from requiring chemical dependency treatment unless the court first finds that the defendant has a

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

chemical dependency that contributed to the offense, but this statute applies only to chemical dependency treatment and not to alcohol treatment. *Warnock* at 613. Except for drug treatment (which is controlled by RCW 9.94A.607), RCW 9.94A.703(3)(c)-(d) authorizes the trial court to order the defendant to participate in crime-related treatment and to participate in rehabilitative programs "reasonably related to the circumstances of the offense."

In the instant case, the record shows that Tomas was drinking alcohol when the offense occurred. RP 55-57, 295. Therefore, an alcohol evaluation and follow up treatment are "reasonably related to the circumstances of the offense." RCW 9.94A.703(3)(d); *State v. Warnock*, 174 Wn. App. 608, 299 P.3d 1173 (2013); *State v. Jones,* 118 Wn. App. 199, 76 P.3d 258 (2003).

As in *Warnock*, because there is no evidence in the instant case that anything other than alcohol contributed to the offense, the trial court erred when it ordered chemical dependency treatment. This Court should remand to the trial court to remove the chemical dependency evaluation and treatment requirement and to impose in its place an alcohol evaluation and treatment requirement. *Warnock* at 614.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

E. CONCLUSION

The evidence is sufficient to sustain the jury's convictions of both kidnapping in the first degree and assault in the first degree. Each offense requires proof of an element that the other does not require, and there is sufficient proof in the record to support the jury's findings in regard to each of the elements for both offenses. Tomas restrained Lowe when he took him against his will to the clear-cut. The kidnapping was done for the purpose of changing the location of the latter assault, but it was not preliminarily necessary in order to carry out the assault, and it was not a part of the latter assault.

Because the facts of this case show that the crime of kidnapping and the crime of assault occurred at different times and at different places, and because between the time of the two crimes the defendant had an opportunity to pause and reflect before committing the second crime, the crimes do not constitute the same criminal conduct for sentencing purposes. Additionally, the defendant's objective criminal intent was different in regard to the two crimes.

Finally, there is no evidence that Tomas suffers from a chemical dependency or that a chemical dependency contributed to his crimes, and

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the trial court erred by ordering a chemical dependency evaluation and follow up treatment without making a finding of chemical dependency. But there is evidence in the record that alcohol use is related to the circumstances of these offenses, and because the court has statutory authority to order crime related treatment and rehabilitative conditions, this Court should return this case to the trial court to strike the requirement for chemical dependency treatment and replace it with a requirement for alcohol treatment.

DATED: October 4, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney

Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

October 04, 2013 - 5:42 PM

Transmittal Letter

Document Uploaded: 443899-Respondent's Brief.pdf

Case Name: State v. Adrian Juan Tomas

Court of Appeals Case Number: 44389-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: **timh@co.mason.wa.us**

A copy of this document has been emailed to the following addresses:

ted9@me.com